SUPREME COURT, U.S.
WASH. D.C.
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No. 94-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ISRAEL S. WEISSBRODT,

Petitioner,

v.

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA AND THE UNITED STATES,

Respondents.

Response Of White Mountain Apache Tribe Of Arizona In Opposition To Petition For Writ Of Certiorari Filed By Israel S. Weissbrodt

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Court's Rule 15 admonishes Respondent White Mountain Apache Tribe of Arizona to ". . . address any perceived misstatements of fact or law set forth in the petition" for writ of certiorari filed here by Israel S. Weissbrodt "which have a bearing on the question of what issues would properly be before the Court if certiorari were granted."[1]

Respondent Tribe stresses to the Court that the issues which Petitioner Weissbrodt seeks to present to the Court for review have all been resolved against him. Reference in that connection is made to the July 12, 1994 Judgment

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[1] Rule 15, Rules of the Supreme Court of the United States.

of the Court of Appeals for the Federal Circuit.[2] The Judgment of the Court of Appeals affirmed the November 4, 1993 Opinion of the Court of Federal Claims.[3] The trial court's Opinion, thus affirmed, is replete with unchallenged findings against Petitioner Weissbrodt and is res judicata respecting all of the issues that Petitioner Weissbrodt seeks to have the Court review.

A critical fact respecting the issues presented by Petitioner Weissbrodt is that he failed to recognize that Chairman Ronnie Lupe and the Tribal Council were fully aware of the grave threats to their future due to the suppression by agents of the United States Trustee of all water resource development on Tribe's Reservation. Reference is made to the fact that the trial court initially found that Respondent Tribe had retained Counsel in an effort to preserve, protect and exercise Tribe's invaluable, indeed life-sustaining reserved rights to the use of water in the Salt River.[4] That stream has its source within Tribe's Fort Apache Indian Reservation. It is most relevant that the trial court likewise found, that:

> Tribal Council Chairman Ronnie Lupe raised the concern that ¶ 6 of the settlement offer would require the Tribe to waive its rights to other claims, including water rights and land recovery claims.[5]

Petitioner Weissbrodt's statements to the Court that a recommendation by a low level government lawyer could

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[2] Pet.App. A, p. 1a; In the United States Court of Appeals for the Federal Circuit, No. 94-5036; *White Mountain Apache Tribe of Arizona, Plaintiff-Appellee v. United States, Defendant-Appellee, v. Israel S. Weissbrodt,* Movant-Appellant, Judgment. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED . . .; AFFIRMED, See Fed. Cir. R. 36.

[3] Pet. App. B, p. 2a, Trial Court Opinion; *see infra* p. 23-26.

[4] Pet. App. B, 6a; 30 Fed.Cl.8, 11 (1993).

[5] *Ibid.*, [Sec. 6] That the judgments entered into pursuant to this settlement shall finally dispose of all rights, claims, and demands which the plaintiffs have asserted or could have asserted against the defendant under the provisions of the Indian Clams Commission Act in Docket No. 22-H before the Court of Claims.

in any way preserve and protect Tribe's Salt River rights against the adverse claims of the United States Trustee partakes of the ridiculous.[6] It is likewise ridiculous for Petitioner Weissbrodt to state that Counsel for Respondent Tribe could unduly influence the Tribe in regard to the Tribe's efforts to preserve and protect its land and life-sustaining water resources. Most assuredly Respondent Tribe was fully aware of the problems involved and could not possibly be unduly influenced by Counsel, as the trial court found, all as will be hereafter reviewed and documented.

TRIAL COURT'S OPINION AFFIRMED ON APPEAL PRECLUDES REVIEW OF ISSUES PRESENTED BY PETITIONER WEISSBRODT

I.

"The Results Obtained" by Petitioner Weissbrodt[7] "Essentially Nil;"[8] "Virtually Useless"[9]

Petitioner Weissbrodt was awarded by the Court of Federal Claims fees of $200,000.00 for services rendered to Respondent Tribe in the prosecution of Docket No. 22-H, plus expenses, for a total award of $275,204.44.[10] That award has been challenged here by Petitioner Weissbrodt on the grounds that it is grossly insufficient. Respecting that award, the trial court reviewed in depth and in detail the results obtained by Petitioner Weissbrodt on behalf of the Tribe and rejected Petitioner Weissbrodt's contention that he was entitled to a fee of $1,300,000.00, which is 10% of Petitioner Weissbrodt's proposed $13,000,000 settlement which the Tribe had rejected.[11]

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[6] Pet. p. 4, *et seq.*

[7] Pet. App. B, p. 11a, *et seq;* 30 Fed.Cl. 8, 14 (1993).

[8] Pet. App. 13a; 30 Fed.Cl. 8, 14 (1993).

[9] Pet. App. B, 25a; 30 Fed.Cl. 8, 20 (1993).

[10] Pet. App. B, 31a; 30 Fed.Cl. 8, 22-23 (1993).

[11] Pet. App. B, 5a, 12a-13a; 30 Fed.Cl. 8, 11, *et seq.* (1993).

Following an intensive review of the record, the trial court found these facts:

> A rejected settlement . . . cannot reasonably be termed a 'result accomplished' *that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained* by the associated attorneys [Petitioner Weissbrodt] *for the Tribe was essentially nil.*[12]

Continuing, the trial court found that some of the services performed by Petitioner Weissbrodt "provided some benefit to the Tribe," declaring, nevertheless, that:

> . . . the record belies the associated attorneys' [Petitioner Weissbrodt's] assertion that the value of these services should be measured using either the proposed settlement or the final award as lodestars.[13]

Thereafter, the trial court found that:

> Based on the record and the court's first-hand knowledge of the trials, it is clear that the research performed by the associated attorneys [Petitioner Weissbrodt] was not used in obtaining the final judgment. The research undertaken for the settlement was never turned over to the Tribe.[14]

Having reviewed the alleged services rendered by Petitioner Weissbrodt for the benefit of the Tribe respecting the fiscal aspects of Tribe's claim, the court found as a fact:

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[12] Pet. App. B, 12a-13a, *et seq.;* 30 Fed.Cl. 8, 14 (1993). (Emphasis supplied).

[13] *Ibid.*

[14] *Ibid.*

> [Petitioner Weissbrodt contends that his] . . . work was instrumental in obtaining . . . the accounting report . . . The court acknowledges this work in its calculation of the award due on the motion for fees . . . . Under these circumstances, the court is justified in substantially limiting the award due the associated attorneys [Petitioner Weissbrodt].[15]

It is of controlling importance that those explicit findings respecting "the results obtained" by Mr. Weissbrodt for the benefit of Respondent Tribe were never challenged on appeal by Mr. Weissbrodt, and as a consequence the affirmance of that judgment is conclusive against Petitioner Weissbrodt and is not subject to review by the Court.[16]

Failure of Petitioner Weissbrodt to Sustain His Burden of Proof

The courts have vigorously enforced the principle that there resides with the attorney seeking fees the burden of proving the services for which he seeks payment, what he did, and the value of those services.[17] In stressing the inadequacies of Petitioner Weissbrodt's attempt to prove his claim, the trial court entered specific findings which findings were never challenged and are binding here upon Petitioner Weissbrodt. Respecting Petitioner Weissbrodt's futile efforts to sustain his claim, the trial court referred to the data he submitted and found that:

> These submissions . . . cause concern *due to lack of specificity, regarding the nature of the work and the client for whom the work was done.*[18]

In addition, the trial court found that "[t]he sheets submitted contain only the number of hours worked, and do not provide any sort of description of the work per-

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[15] *Ibid.* p. 14a; p. 14-15.

[16] *Infra.* p. 23-26.

[17] *Infra.* p. 21-23.

[18] Pet. App. B, p. 18a, 30 Fed.Cl. 8, 17 (1993). (Emphasis supplied).

formed." Due to those transcendent failures, the court concluded that it: "*. . . has no basis for determining whether the amounts claimed are properly allocable to the Tribe.*"[19]

Failure of Petitioner Weissbrodt properly to support his contrived claims is established by these additional findings of the trial court:

> . . . the sheets distribute the hours worked between three clients: White Mountain Apache Tribe, Western Apache Tribe, and San Carlos Apache Tribe.[20]

Finally, the trial court found that:

> *In the instant case, it is difficult to assess what, if any, work performed by the associated attorneys [Petitioner Weissbrodt] contributed to the final judgment for the Tribe . . . the services rendered and the results obtained by the associated attorneys [Petitioner Weissbrodt] in this case are insufficiently established to justify using a contingent fee calculation.*[21]

After continuing its intensive review of the failure of Petitioner Weissbrodt to establish ". . . a substantial, quantifiable, and easily identifiable contribution . . .,"[22] the trial court made this specific evaluation respecting Petitioner Weissbrodt's claims for fees:

> *Given the earlier determination by this court that the work product of the associated attorneys, [Petitioner Weissbrodt] was virtually useless, an award of slightly more than one percent, and not a full 10 percent, is the maximum this court could justify awarding.*[23]

Failure of Mr. Weissbrodt in his petition to this Court to set forth and explain the findings respecting the grave

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[19] Pet. App. B, p. 18a; 30 Fed.Cl. 8, 17 (1993). (Emphasis supplied).

[20] Pet. App. B, p. 19a; 30 Fed.Cl. 8, 17 (1993).

[21] Pet. App. B, p. 24a, 30 Fed.Cl. 8, 19 (1993). (Emphasis supplied).

[22] Pet. App. B, p. 24a; 30 Fed.Cl. 8, 19 (1993).

[23] Pet. App. B, p. 25a; 30 Fed.Cl. 8, 20 (1993). (Emphasis supplied).

deficiencies in the information he submitted to support his unconscionable claim underscores the general inadequacy of his presentation here.

ARGUMENT

CONTRAST—NOT COMPARISON—BETWEEN RESPONDENT TRIBE'S FINAL JUDGMENT AND PETITIONER WEISSBRODT'S REJECTED SETTLEMENT

Petitioner Weissbrodt's futile attempt to compare one phase of Respondent Tribe's final judgment—the $19M—with the rejected $13M settlement that he espoused could only be undertaken with the objective of misleading the Court. Throughout his entire Petition, Mr. Weissbrodt misstates the amount of the award to the Tribe as being $14.4M. To present even a remote comparison between Tribe's final judgment and the rejected $13M settlement, it was essential for Mr. Weissbrodt to deduct from the Tribe's $19M, "$4 1/2 million in interest."[24] Desperation to create a comparison where none exists is the explanation for Petitioner Weissbrodt's misrepresentation to the court that the almost $5M in interest awarded to the Tribe was not part of the Tribe's final judgment.

The trial court specifically declared that title to Tribe's Salt River rights remained in Respondent Tribe irrespective of the aggressive claims to the contrary by the United States.[25] The trial court rejected repeated efforts by Petitioner Weissbrodt to compare Tribe's final judgment with the rejected $13M settlement, stating that Mr. Weissbrodt hypothesized:

> *. . . the Tribe would be in a better position than receiving an award in 1993 of $19,000,000 . . . The comparison is invalid . . . In fact, the Tribe recovered*

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[24] Pet. p. 9.

[25] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 629, 638 (1987).

substantially more in 1992 than the settlement as a result of having litigated its claims.[26]

Included in that "substantially more," as found by the trial court, is the explicit affirmation by the trial court of Tribe's title to its priceless reserved Salt River rights. Respecting that affirmance, the trial court found that the Secretary of the United States, Department of the Interior, had constructed for the non-Indian Salt River Water Users ". . . the Salt River Federal Reclamation Project . . ." which secretarial project, as found by the trial court, was designed and constructed to utilize ". . . all of the natural and surplus flow of the Salt River coming off the [Tribe's] Reservation . . . ."[27] It is equally significant that the trial court found that the Secretary of the Interior had planned and constructed the Roosevelt Dam and Reservoir upon the postulate ". . . that no upstream diversions would diminish the flow into the Reservoir."[28]

It was with the full knowledge by Respondent White Mountain Apache Tribe of the aggressive adverse claims of the Secretary of the Interior to all of the Salt River waters on Tribe's Reservation that the Tribe directed Counsel fully to try the issues respecting the claim of the Secretary to Tribe's title to the Salt River water. Respondent Tribe was fully rewarded for its courageous challenge of the Secretary of the Interior and the downstream politically powerful non-Indian water users when the trial court entered its judgment in favor of the Tribe declaring, decreeing, and determining that: ". . . it can be found that the Government officials . . . periodically took the position that the . . ." claims to the Salt River water by the Salt River Federal Reclamation Project ". . . were prior to and superior to the Tribes. *This view-point was incorrect.*"[29]

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[26] Pet. App. B, 19a-20a; 30 Fed.Cl. 8, 17 (1993). (Emphasis supplied).

[27] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 623 (Cl.Ct. 1987).

[28] *Ibid.*, p. 629.

[29] *Ibid.*, p. 638 (1987). (Emphasis supplied).

The trial court explicitly adjudged and declared:

> *Plaintiff's* Winters *Doctrine rights . . . take their life from the date, at the latest, when the reservation was created . . . and have priority over the rights asserted by the later-created . . .*" Secretarial Salt River Federal Reclamation Project.[30]

The value of Tribe's reserved Salt River rights to the use of water has been conservatively appraised by Respondent Tribe's experts as being $250,000,000. Rule 15 of the court was clearly violated by Petitioner Weissbrodt when he failed to bring to the court's attention that a critical aspect of the judgment entered on behalf of Respondent Tribe was the explicit affirmation that the Tribe had retained its title to those irreplaceable reserved Salt River rights for use on "49,800 acres . . . which are practically irrigable."[31] That adjudication precludes any further effort on the part of Petitioner Weissbrodt to compare the judgment entered on behalf of the Tribe after its full trial on the merits with Petitioner Weissbrodt's rejected $13M settlement.

It is equally important to Respondent Tribe that the trial court found as a fact that:

> . . . the Government initiated and condoned the stocking conditions that produced overgrazed rangeland, *in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted.*[32]

The trial court did not award commensurate damages for the injury the Tribe had sustained and is sustaining due to the accelerated erosion. A remedy for the Tribe is imperatively required by reason of the fact that its Reservation is literally washing away today. Whether a leg-

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[30] *Ibid.*, (Emphasis supplied).

[31] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 627 (1987).

[32] *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl.Ct. 614, 659 (1987). (Emphasis supplied).

islative remedy is available is not known. Nevertheless, the proof of the environmental catastrophe and the fixing of responsibility on the United States Trustee warranted the trial, if for no other reason.

Hallmark of Petitioner Weissbrodt's failure to fulfill his professional obligation to the Tribe is exemplified by his settlement of Tribe's claims for the taking of its aboriginal lands in Docket No. 22-D. Petitioner Weissbrodt left unresolved the ongoing, harsh, and bitter controversies with the United States Trustee in regard to Tribe's invaluable reserved Salt River rights to the use of water and, as stated above, the mismanagement of Tribe's rangelands through overgrazing that gave rise to the accelerated erosion, and the gross mismanagement of Tribe's magnificent forest lands by overcutting far in excess of the safe annual yield. Moreover, Petitioner Weissbrodt—under highly suspicious circumstances—settled Tribe's claims involving Tribe's aboriginal lands outside the Reservation without resolving the Tribe's ongoing controversy with the Trustee over the correct location of Tribe's northern boundary. In explicit terms, the Executive Orders of 1871 and 1872 creating the Tribe's Reservation, designated the northern boundary of the then White Mountain Apache Reservation as being "the south edge of the Black Mesa." A controlling fact respecting "the south edge of the Black Mesa" is that it is a well defined, well known, and easily recognized natural monument. Rather than following that well defined natural monument, an agent of the United States Trustee, in surveying that northern boundary, departed drastically from "the south edge of the Black Mesa." That erroneous survey, contrary to the governing principles of law, has resulted in the exclusion from Tribe's reservation of 16,090 acres of Tribe's aboriginal lands, substantial portions of which were comprised of invaluable ponderosa pine forests. It is an elemental principle of law that an erroneous survey cannot change a boundary which is a designated natural monument as here.[33]

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[33] *United States v. State Investment Co.*, 264 U.S. 206, 211 (1924);

Petitioner Weissbrodt ignored that principle and made no effort to resolve the boundary dispute antecedent to settling the Tribe's land claims. It typifies the trial court's assessment of Petitioner Weissbrodt's failure to render any services of value to the Tribe.

PETITIONER WEISSBRODT'S "QUESTION PRESENTED" IS A FALSIFIED, DISTORTED MISSTATEMENT, STRIPPED FROM CONTEXT OF THE TRIAL COURT'S FINAL OPINION AND SHOULD BE REJECTED

Initially, let it be emphasized that the falsified "Question Presented" has never previously been raised in either the trial court or the Court of Appeals for the Federal Circuit. Accordingly, predicated upon unvarying precedents, all as will be reviewed, Mr. Weissbrodt's petition should be rejected. This is the "Question Presented" as set forth above, together with Petitioner Weissbrodt's accompanying interpretive statement, both of which are false.

> Where the 'results obtained' by an attorney are to be considered in determining the amount of the attorney's court-awarded fee governed by federal law, is it the case that no value is to be placed on obtaining a settlement offer that the client rejected before hiring substitute counsel? The lower courts held that the value of such a settlement offer is 'essentially nil' *per se* and is not to be considered in ruling on a fee application. App. at 13a.

Petitioner Weissbrodt departs drastically from his professional responsibility to the Court when he seeks to have this Court review the following nonexistent question: ". . . is it the case that no value is to be placed on ob-

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Oklahoma v. Texas, 268 U.S. 252, 256 (1925); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Puyalup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257, n.6 (1983); *Moore v. United States*, 157 F.2d 760, 762 (CA 9, 1946); *cert. den.* 300 U.S. 827 (1947); *United States v. Walker River Irrigation District*, 104 F.2d 334, 337 (CA 9, 1939); *Northern Pacific Railroad Co. v. United States*, 227 U.S. 325, 355 (1913).

taining a settlement offer that the client rejected before hiring substitute counsel?"

That statement does not appear in the trial court's opinion here for review. It is totally contrived. Compounding the falsity of that statement is the sentence that follows the "Question Presented." Contrary to fact, it is stated, "The lower courts held that the value of such a settlement offer is 'essentially nil' *per se* and is not to be considered in ruling on a fee application."

It is noteworthy that Petitioner Weissbrodt cites "App. at 13a" in support of those misstatements. A review of that page establishes beyond controversy that neither the quote or Petitioner Weissbrodt's interpretation of the quote will be found at the reference cited by Respondent Weissbrodt or elsewhere in the opinion.

On the last-cited page 13a of the trial court's opinion, that court found that:

> *A rejected settlement . . . cannot reasonably be termed a 'result accomplished' that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys [Petitioner Weissbrodt] for the Tribe was essentially nil.*[34]

Petitioner Weissbrodt has totally stripped from context the term "essentially nil," perverted the facts to which the term pertains, and fabricated his petition predicated upon that perversion. It is a gross violation of professional responsibility.

In simplest terms, the trial court stated that Petitioner Weissbrodt was not entitled to 10% of the $19M awarded to Petitioner Tribe by reason of the fact that the $19M judgment resulted from the preparation and full trial on the merits of litigation in which Petitioner Weissbrodt did not participate.[35] Having falsified the finding in the "Ques-

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[34] Pet. App. B, p. 13a; 30 Fed.Cl. 8, 14 (1993). (Emphasis supplied).

[35] *Ibid.*

tion Presented," Petitioner Weissbrodt proceeded falsely throughout the entire petition. For example, he declared that the trial court in rendering its opinion, "did not acknowledge the cases" which addressed Petitioner Weissbrodt's falsified issue

> . . . without applying any *per se* rule that a rejected settlement must be ignored . . . nor did it cite any case embracing the [falsified] *per se* rule.[36]

Under the heading of "Reasons for Granting the Writ," Petitioner Weissbrodt urges to the Court that, by applying the nonexistent *per se* rule, "the lower courts . . . shifted a major element of economic cost of rejecting a reasonable settlement . . ."[37] upon the Counsel making the recommendation for the settlement. Contrary to facts found by the trial court, Petitioner Weissbrodt states that, by hiring new counsel, Respondent Tribe ". . . effectively received thirty years' worth of legal services for close to no fee. Such a windfall [had it actually occurred] would appear unfair in any event."[38] Let it be reiterated here that throughout the "thirty years' worth," Petitioner Weissbrodt did not, as explicitly found by the trial court, render anything but minimal services that were "virtually useless" to Respondent Tribe.[39]

Petitioner Weissbrodt states that ". . . this case provides a paradigm of the type of case most likely to suffer . . ." from the falsified *per se* rule, "applied by the lower courts . . . ."[40] For Petitioner Weissbrodt to suggest that the falsified and contrived case that he has presented to the Court constitutes a model or pattern which should be considered by the Court is another gross example of Petitioner Weissbrodt seeking to mislead the Court. Petitioner Weissbrodt refers to Respondent Tribe as:

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[36] Pet. p. 11-12.

[37] Pet. p. 13.

[38] *Ibid.*, p. 12-13, *et seq.*

[39] Pet. App. p. 25a.

[40] Pet. 14.

> . . . a group of people that were numerous enough to have a multimillion dollar claim . . . in which a relatively compact—but still potentially fractious—group stands to share in a large recovery, that are often the most consuming of judicial resources.[41]

Pursuing those false concepts and applying the equally false *per se* rule, Petitioner Weissbrodt states that the litigants in cases of this character:

> . . . are those most often susceptible to the 'volunteer' 'spoiler' counsel, who attack a proposed settlement with the promise of a huge recovery and hints of a sell-out by the original counsel who is recommending settlement.[42]

Petitioner Weissbrodt then states that provision should be made ". . . for the award of compensation to the original counsel as if the initially negotiated settlement had been accepted . . ."[43] The complete and total answer to the false posturing of Petitioner Weissbrodt is once more to remind him that the Tribe's judgment was $19M—and not $14M—as he continued to misstate. Moreover, Petitioner Weissbrodt failed to take cognizance of the vast benefits accruing to the Tribe by the full trial on the merits which resulted in the trial court's affirmance of Tribe's title to the invaluable reserved Salt River rights and the fixing of liability upon the United States Trustee for the environmental catastrophe on Tribe's Reservation.[44]

Respondent Tribe's last statements as to the immense value to the Tribe of the full trial on the merits constitutes a complete answer to Petitioner Weissbrodt's false question, false statements, and false arguments, and likewise refutes totally Petitioner Weissbrodt's concluding declaration that:

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[41] Pet. p. 14-15.

[42] Pet. p. 16.

[43] *Ibid.*, p. 16.

[44] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 629, 638, 652, 659 (1987).

> The benefits of a settlement in 1980 would have been enormous. The Tribe would have received a far better recovery. [Petitioner Weissbrodt concluded with this non sequitur]. Ten years of complex litigation, punctuated by frequent frivolous positions by the plaintiff *would have been permitted.*[45]

Respondent Tribe's summary of the results it achieved through the full preparation and trial on the merits of its claims against the United States Trustee renders ludicrous Petitioner Weissbrodt's reiteration of his mindless argument that the Tribe would have been better served to accept the $13M settlement. Petitioner Weissbrodt continues his posturing by advising the Court that this case affords it an opportunity

> . . . to enunciate a proper rule: that the rejected settlement must be viewed as a result obtained [irrespective of the facts]; and that in appropriate cases a percentage fee based on the settlement must be awarded to Counsel presenting a settlement which is then rejected, to the extent that ultimately there is a recovery.[46]

The trial court fully answered that innane proposal in its opinion:

> Awarding a fee to the associated attorneys [Petitioner Weissbrodt] based on an [sic] result obtained by another attorney who has already been compensated would not only be incomprehensible, it would be wrong. A contingency fee is meant to be a merit-based form of compensation. It is not the guaranteed windfall that the associated attorneys [Petitioner Weissbrodt] appear to think it is.[47]

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[45] Pet. p. 19.

[46] *Ibid.*

[47] Pet. App. p. 21a.

PETITIONER WEISSBRODT, IN THE "STATEMENT"[48] HAS PERVERTED THE FACTS AND DISTORTED THE LAW TO SUPPORT THE FALSIFIED *PER SE* RULE

There has been reviewed above the falsified question that misrepresents to this Court that the trial court's opinion here for review applied the "*per se*" rule that a rejected settlement must be ignored in fixing an attorney's fees. Petitioner likewise states that the trial court did not cite any case embracing the "*per se*" rule.[49] That is not surprising by reason of the fact that at no time did the trial court or the Court of Appeals mention that nonexistent "*per se*" rule. Continuing to violate the express language of the trial court's opinion, which is controlling here, Petitioner Weissbrodt states that Counsel misled Respondent Tribe by offering the Tribe ". . . visions of a huge judgment, amounting to more than ten times the amount of the proposed settlement—and exceeding by a similar factor the actual $14.4M judgment finally obtained after another decade of litigation."[50]

In rejecting comparable misstatements made below by Petitioner Weissbrodt, the trial court early on found as a fact that Petitioner Weissbrodt has "made allegations that the Tribe was unduly influenced by Mr. Veeder."[51] The trial court then entered these findings: Petitioner Weissbrodt has ". . . introduced no evidence to indicate that the Tribe's decision was irrational or the product of undue influence." By way of emphasis, the trial court then found that "[e]vidence to the contrary abounds."[52] On the basis of that emphatic declaration that Counsel did not engage in unduly influencing Respondent Tribe, the trial court then declared:

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[48] Pet. p. 3-12.

[49] Pet. p. 11-12.

[50] Pet. p. 5.

[51] *Ibid.*

[52] Pet. App. B, 12a-13a; 30 Fed.Cl. 8, 14 (1993).

> Absent significant evidence of fraud or mutual mistake, this court is unwilling and unable to question the validity of the Tribe's decision.[53]

It is essential to reiterate here that the critical finding that there was no undue influence by Respondent Tribe's Counsel and the affirmation of that finding on appeal—predicated on the principles of *res judicata*[54]—totally precludes Petitioner Weissbrodt's efforts to mislead the Court by his vituperative and false charges against Counsel. It is likewise reiterated that throughout Petitioner Weissbrodt's Statement, he has continued to falsify the monetary recovery received by the Tribe. After a full trial on the merits, the Tribe was awarded $19M as part of the judgment in its favor, as distinguished from the $14.4M which Petitioner Weissbrodt has falsely presented throughout. Petitioner Weissbrodt had utilized those false charges in an unsuccessful effort to compare Tribe's final judgment, as it pertains to the monetary award to the Tribe, with the $13M settlement proposed by Petitioner Weissbrodt which was rejected by Respondent Tribe, as reviewed above.

With customary savagery, Petitioner Weissbrodt charges Counsel with consumption of judicial resources; disobeying court orders; and prosecuting appeals.[55] Petitioner Weissbrodt referred to the fact that the trial court dismissed Tribe's complaint.[56] Reference is then made by Petitioner Weissbrodt to the fact that the Court of Appeals reversed the trial court, restored the Tribe's complaint and directed a continuation of the proceedings.[57] However, it is of interest that Petitioner Weissbrodt refer only to the dis-

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[53] Pet. App. B, p. 12a-13a; 30 Fed.Cl. 8, 14 (1993).

[54] *Infra.*, p. 23-26.

[55] Pet. p. 6-8.

[56] *Ibid.*

[57] Pet. p. 6-11, Contains false statements as to the value of the settlement to the Tribe which was repeatedly rejected by the trial court. *See*, Pet. App. 22a, 30 Fed.Cl. 8, 18-19 (1993).

senting decision which can be read as criticizing Tribe's Counsel.

The entire Petition is a studied attack upon the very same trial court that originally dismissed Tribe's complaint. Once again, it is emphasized that the irresponsible charges directed against Counsel by Petitioner Weissbrodt were totally and completely rejected by the trial court's findings establishing these facts:

> The court notes that the associated attorneys [Petitioner Weissbrodt] fault Mr. Veeder's conduct of the litigation .... This court has presided over the White Mountain case since ... January 25, 1983, with Mr. Veeder as counsel of record during all but 9 1/2 months. For nine years during the litigation ... the court has acquired total familiarity with the legal effort on the Tribe's behalf.[58]

Continuing, the trial court contrasted the work of Respondent Tribe's Counsel with that of Petitioner Weissbrodt. The trial court then, in substance, reiterated the fact that Petitioner Weissbrodt's efforts from the standpoint of benefiting the Tribe were "essentially nil" and were "useless" and stating in reply to Petitioner Weissbrodt's attacks on Counsel that:

> The associated attorneys [Petitioner Weissbrodt] left no fingerprints on the case that was eventually passed on to Mr. Veeder. The 1978 trial record [Petitioner Weissbrodt's] on certain fiscal claims was unusable, and this court tried the Tribe's fiscal claims in full. Mr. Veeder may be difficult and trying to the court's patience, but he has served as an absolutely dedicated advocate on the Tribe's behalf, and the Tribe has been fortunate to have his counsel.[59]

In rejecting the aggressive but futile efforts of Petitioner Weissbrodt to share in the Tribe's $19M monetary award,

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[58] Pet. App. B., p. 22a, n.5.

[59] *Ibid.*

the trial court further exposed as frivolous and false Petitioner Weissbrodt's charges by declaring:

> This award reflects Mr. Veeder's work and does not reflect the work done by the associated attorneys [Petitioner Weissbrodt]. No one is in a better position to pass on the relative capabilities of the associated attorneys [Petitioner Weissbrodt] and Mr. Veeder than this court, whose final task after years of arduous litigation is to assure that justice is done in a case of this magnitude and complexity.[60]

It is to be observed that Petitioner Weissbrodt continued his vicious attacks upon Respondent Tribe's Counsel for approximately half of the Statement and related phases of the Petition. It is believed that it would serve no useful purpose for Counsel to respond to each of the sordid, futile attacks upon him. It is sufficient to say that the trial court, after a decade of litigation involving primarily the destruction of Tribe's Fort Apache Indian Reservation due to the Trustee's "careless administration;"[61] rejected the claims of the United States Trustee to all of the Salt River water arising upon Tribe's reservation; and explicitly declared that the Tribe's title to the reserved Salt River rights had not been taken nor diminished. Similarly, as stated above, it is found as a fact that due to "careless administration," the United States Trustee ". . . must be held liable for the accelerated erosion."[62]

THE GOVERNING PRINCIPLES OF LAW PRECLUDE PETITIONER WEISSBRODT FROM BEING HEARD IN THE COURT AND MANDATE SANCTIONS

Petitioner Weissbrodt Seeks to Present the Central Issue to the Court for the First Time

Petitioner Weissbrodt in the Question Presented[63] seeks to avoid the consequences of the findings of fact, conclu-

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[60] Pet. App. B, p. 22a.

[61] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 652 (1987).

[62] *Ibid.*

[63] QUESTIONS PRESENTED: Where the "*results obtained*" by an

sions of law, and judgment of the trial court which were affirmed by the Court of Appeals. As reviewed and documented above, Petitioner Weissbrodt contrived a concept that the trial court had found that the value of the rejected settlement was "essentially nil, *per se*" and predicated upon that falsification has requested the Court to review that issue. Most assuredly Petitioner Weissbrodt did not present, brief, or argue that issue in either the trial court or in the Court of Appeals. As a consequence, this Court, by unvarying precedents, has refused to hear issues of that character raised for the first time in the Court.[64] In its *Duignan v. United States* Opinion, the Court stressed that:

> This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

More recently, the Court reiterated those concepts in these terms:

> The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.[65]

It is observed by Respondent Tribe based on the Court's *Duignan* Decision, that the only exceptional issue presented by Petitioner Weissbrodt is his temerity in falsifying an issue and requesting the Court to review it.

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attorney are to be considered in determining the amount of the attorney's court-awarded fee governed by federal law, is it the case that no value is to be placed on obtaining a settlement offer that the client rejected before hiring substitute counsel? The lower courts held that the value of such a settlement offer is "essentially nil" *per se* and is not to be considered in ruling on a fee application. App. at 13a.

[64] 274 U.S. 195, 200 (1927).

[65] *Miree et al., v. DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977); *See*, also 2 *Federal Procedure, Lawyers Ed.;* Appeal, Certiorari, and Review, Sec. 3.4; 3.8, p. 267, *et seq.*

Respondent Tribe prays this Court to deny the fabricated issue presented to the Court which does not achieve the status of "an afterthought," as observed by the Court in its *Miree* Decision.

Findings that Petitioner Weissbrodt Failed to Sustain His Burden Controlling Here

The documented findings that Petitioner Weissbrodt failed to sustain his burden respecting the work he performed and the client for whom he performed it is a barrier here to recovery.[66]

In its Opinion, the trial court declared, citing the case of *Hensley v. Eckerhart:*

> A fee application is not meant to be a time-consuming trial-type proceeding. . . . Rather, it is a summary proceeding by which the court determines a fee that is reasonable for the work performed.[67]

In *Hensley,* the Court declared that:

> Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. We re-emphasize that the district court has discretion in determining the amount of a fee award.[68]

The Court, moreover, in *Hensley v. Eckerhart,* referred to these principles which are controlling:

> The product of reasonable hours times a reasonable rate does not end the inquiry.[69]

Here, the trial court found as a fact that it was impossible to determine the work that was performed by Petitioner

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[66] *Supra,* p. 5, *et seq.*

[67] Pet. App.B, p. 9a; 30 Fed.Cl. 8, 13 (1993).

[68] *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983).

[69] *Ibid.,* p. 434.

Weissbrodt or for whom. Hence, the court could not find "the product of reasonable hours," the single-most important factor in arriving at a reasonable fee. As a result, Petitioner Weissbrodt's claims were constricted by the trial court. The Court in *Hensley* further declared:

> There remains other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'[70]

In regard to the "results obtained" by Petitioner Weissbrodt, it is essential again to refer to the explicit findings of the trial court. On the background of those unvarying findings that Petitioner Weissbrodt's record in support of his claim is fatally defective, the court very properly added this conclusive finding:

> A rejected settlement . . . cannot reasonably be termed 'a result accomplished' that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys [Petitioner Weissbrodt] for the Tribe was essentially nil.[71]

The court below referenced the decision of *Naporano Iron Metal Co. v. United States.*[72] There it is declared, predicted upon a failure of the claimant involved adequately to support his claim—as found by the trial court in regard to Petitioner Weissbrodt—that:

> Such a showing [lack of itemization in the documents] is inadequate to support an award of attorneys' fees . . . . Much more detail is needed . . . . The court needs contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates . . . . In the absence of such an itemized statement, the court is unable to determine whether the hours,

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[70] *Ibid.*

[71] Pet. App. B, p. 13a; 30 Fed.Cl. 8, 14 (1993).

[72] 825 F.2d 403, 404-405 (Fed. Cir. 1987).

> fees and expenses, are reasonable for any individual item.[73]

Failure of Petitioner Weissbrodt even remotely to sustain his legal obligation of establishing the alleged services to the Tribe all as found above, resulted in the Trial court's determination that:

> Justice would be disserved if this court were required administratively to discharge 10-percent of the Tribe's hard-won judgment to the Associated Attorneys based on the showing that has been put forward on their behalf. Since no sum exists that actually inured to the benefit of the Tribe from which a percentage fee can be calculated, compensation is most appropriately awarded using a fixed fee. [$200,000.00].[74]

The Trial Court's Findings As Affirmed Are Binding on Petitioner Weissbrodt

The Court has repeatedly decided that where, as here, Petitioner Weissbrodt seeks to invoke the Court's jurisdiction challenging findings of fact, conclusions of law, and a judgment finally adjudicated by a court of competent jurisdiction, the general rules of *res judicata* are applicable and Petitioner Weissbrodt is bound by them. Petitioner Weissbrodt, predicated on the principles of *res judicata*, is precluded from seeking to relitigate any of the issues that he has attempted to present to the Court in his petition.[75]

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[73] *Ibid.*, p. 404. *See*, also *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327, *et seq.*, (Ca D.C. 1982).

[74] Pet. App. B, p. 23a, 31a; 30 Fed.Cl. 8, 19, 23 (1993).

[75] *Angel v. Bullington*, 330 U.S. 183, 187 (1948). Justice Frankfurter stated: "For purposes of *res judicata*, the significance of what a court says it decides is controlled by the issues that were open for decision." Here, all of the issues properly presented were decided in the trial court and affirmed on appeal; Petitioner Weissbrodt is barred from relitigating any of them. *See*, also *Kramer v. Chemical Construction Corp.*, 456 U.S. 461, 462, 466-467; 469 (1982). In *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1947), the Court states: "The general rule

It was urged to the Court of Appeals that Petitioner Weissbrodt had failed to challenge any of the trial court's findings and hence Petitioner Weissbrodt is bound by those findings. Rule 52a is specific:

> Findings of fact ... shall not be set aside unless clearly erroneous ...

Petitioner Weissbrodt's failure to challenge the trial court's explicit findings resulted in Petitioner Weissbrodt being subjected to those findings predicated on the explicit application of the above mentioned Rule 52a.

In the hallmark decision of *United States v. United States Gypsum Co.*,[76] the Court interpreted and applied Rule 52(a) as follows:

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.[77]

Petitioner Weissbrodt, in the Court, as was attempted in the Court of Appeals, seeks to have the Court try the case *de novo* predicated upon his unsupported facts which are reviewed and repeated throughout his petition for certiorari. In total disregard of the trial court's judgment and the findings upon which it is predicated, Petitioner Weissbrodt attacked the trial court's findings and assaulted Respondent Tribe's Counsel, all as reviewed above. That course of erroneous conduct by Petitioner Weissbrodt

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of *res judicata* applies to repetitious suits involving the same cause of action .... The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' " *See,* 5A *Moore Federal Practice,* Rule 52-12. Effect in Supreme Court of Concurrent Findings of Fact of Two Lower Courts—The Two-Court Rule.

[76] 333 U.S. 364, 394-395 (1948).

[77] *Ibid.*

is precluded by the express language of the Court in *Anderson v. Bessemer City.*[78] There, the Court declared:

> [The clearly erroneous] standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes [as Petitioner Weissbrodt requests] to duplicate the role of the lower court . . . .[79]

As stressed above, the Court of Appeals affirmed the findings of the trial court and irrespective of that affirmance Petitioner Weissbrodt is, in effect, requesting the Court to set aside both the findings and final judgment of the trial court and to reconsider the falsified issues which Petitioner Weissbrodt has created. Re-emphasizing the impossibility here of obtaining a review of findings of fact affirmed, the Court states in *Bessemer* City:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. When there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.[80]

By way of explanation of the all encompassing importance of the "clearly erroneous" concepts, the Court in *Bessemer City* made these further statements:

> The rationale or deference to the original finder of fact [the trial court] is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling

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[78] *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985).

[79] *Ibid.*

[80] *Ibid.*

> that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negatively to the accuracy of fact determination at a huge cost in diversion of judicial resources.[81]

The Court, in *Zenith Radio Corporation* Decision,[82] emphasized that great weight must be accorded to the findings of the trial court by reason of its opportunities to assess the credibility of the witnesses.

It is urged to the Court that it sustain the trial court's findings and judgment predicated upon the unvarying principles enunciated in its *Bessemer* Decision, and the related authorities and reject Petitioner Weissbrodt's request to be heard as being frivolous in the extreme due to the fact that Petitioner Weissbrodt is precluded by the concepts of *res judicata* to relitigate those issues which have been finally adjudicated.

It Is Frivolous for Petitioner Weissbrodt to Request the Court to Review the Affirmed Judgment of the Trial Court

It has been repeatedly emphasized above that Petitioner Weissbrodt in the trial court and on appeal failed to challenge, as clearly erroneous, the explicit findings of the trial court which sharply constricted the fees to be awarded to Petitioner Weissbrodt for his alleged services to Petitioner Tribe. There has been reviewed immediately above the principles enunciated by the Court that litigants are bound by the findings unless those findings are challenged and set aside on appeal as being clearly erroneous. The Court, in its *Southern Railway Co. v. Gadd* Decision declares that where, as here:

> It is manifest on the face of the record that the case was carefully and fully considered in both of the courts below .... we think the conclusion that the writ of

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[81] *Ibid.*, pgs. 574-575.

[82] *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100 (1969).

> error was prosecuted only for delay is plainly justified and that a penalty by way of damages should be imposed. The judgment below is therefore affirmed with five percent upon the amount of the judgment in addition to the interest allowed by law.[83]

The Court of Appeals for the Ninth Circuit in *McConnell v. Critchlow,* considered the criteria for sanctioning frivolous appeals and declared: "This court has discretion to award damages and single or double costs as a sanction against bringing a frivolous appeal," . . . This may include attorneys fees,"[84] citing 28 U.S.C. 1912, which is as follows:

> *Damages and costs on affirmance.* Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

In the last-cited case, the court summarized that the attorney had ". . . failed to exclude from the appeal the judgments favoring the individual defendants although there was no basis for appeal."[85] Here, there was no basis pursuant to which Petitioner Weissbrodt could reasonably seek certiorari and to overcome that deficiency he fabricated the so-called "essentially nil, *per se* rule" and pursued that fabricated issue throughout the entire Petition.

The court of appeals enunciated the concepts applicable here:

> An appeal is considered frivolous in this circuit when the result is obvious . . . or the appellant's arguments of error are wholly without merit.

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[83] 233 U.S. 572, 581 (1914).

[84] 661 F.2d 116, 118 (1981).

[85] *Ibid.*

> Pursuit of a meritless claim [of the character here involved] is not justified by the client's desire to do so.[86]

Where an attorney failed to exercise due diligence, as mandated by the rules of court, the Court of Appeals for the Second Circuit declared:

> Given the feebleness of Beane's proffer of 'due diligence . . .' it was well within the district court's discretion to reject the explanations and to consider the 'evidence' not newly discovered.[87]

From that district court ruling, an appeal was taken. The appellate court declared that the appeal was:

> . . . entirely frivolous—a quality plainly shared by the motion itself—and we are constrained to note that it follows close on the basis of *Potamkin's* direct appeal . . . which we also found to be 'utterly without legal merit,' and frivolous within the meaning of . . . [the Rules of Federal Practice].[88]

In a well-reasoned decision, the Court of Appeals for the Ninth Circuit considered the issues before it on appeal and declared:

> Appellate has essentially attempted to retry factual issues in the appellate forum. This appeal is frivolous. We think it was pursued for purposes of delay . . . 28 U.S.C. 1912, expressly vests us with discretion to impose sanctions upon those who prosecute frivolous appeals . . . . In view of the superfluity of the issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the

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[86] *Ibid.* p. 119.

[87] *United States of America v. Potamkin Cadillac Corp.*, 697 F.2d 491, 492, 493, 494, (CA 2, 1983); cert. den. it is stated that: "The Chief Justice, Justice Rehnquist, and Justice O'Connor would award Respondent damages pursuant to this Court's Rule 49.2, 462 U.S. 1144 (1983).

[88] *Ibid.*, p. 494.

> abundant evidence [as here] supporting the determination [below], we exercise our discretion .... Appellate courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken.[89]

In *Action Manufacturing Inc. v. Fairhaven Textile Corp.*, the Court of Appeals for the First Circuit stated:

> For defendants to pursue this matter on appeal is not merely frivolous, it is an imposition on appellee and the court. For such a severe disregard of counsel's duty it is appropriate to charge counsel personally with attorney's fees as part of appellee's costs."[90]

It has similarly been stated, citing 28 U.S.C. 1912, that:

> Appellate courts have the undisputed power to sanction a party who brings a frivolous appeal .... An appeal is considered frivolous when its disposition is 'obvious,' and the legal arguments are 'wholly without merit' ....[91]

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[89] *United States ... v. Santa Fe Engineering Inc.*, 567 F.2d 860, 861 (CA 9, 1978).

[90] 790 F.2d 164, 166 (CA 1, 1986).

[91] *Reliance Insurance Co. v. Sweeney*, 792 F.2d 1137, 1138 (Ca A, D.C. 1986). *See*, also 67 ALR Fed. 1319, *et al.*, Sanctions for frivolous appeals; see also supplement 67 ALR Fed. Issued October 19, 1993.

CONCLUSION

It is respectfully urged to the Court that Respondent Tribe has been subjected to a frivolous and vexatious proceeding by Petitioner Weissbrodt which is totally without merit.

WHEREFORE, RESPONDENT WHITE MOUNTAIN APACHE TRIBE, RESPECTFULLY PRAYS THIS COURT to deny the petition for writ of certiorari and to assess costs, fees, damages, and interest as appropriate sanctions for Petitioner Weissbrodt's grave misconduct.

Respectfully submitted,

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